

BEFORE THE MONTANA STATE AUDITOR  
AND COMMISSIONER OF INSURANCE  
HELENA, MONTANA

IN THE MATTER OF:	)	Case No. INS-2007-11
	)	
BLUE CROSS AND BLUE SHIELD OF	)	
MONTANA, INC., an authorized Health Service	)	FINAL AGENCY DECISION
Corporation, Certificate of Authority No. 2641,	)	
	)	
Respondent.	)	
	)	

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The State Auditor in his position as ex-Officio Commissioner of Insurance (Commissioner) has reviewed the Proposed Order<sup>1</sup> issued by the duly appointed hearing examiner in this case, Respondent Blue Cross Blue Shield's (BCBS) Proposed Findings of Fact and Conclusions of Law, BCBS's Exceptions and Objections, the Department of Insurance's (DOI) Proposed Findings of Fact and Conclusions of Law, the DOI's Exceptions and Objections, the DOI's brief responding to BCBS's Exceptions and Objections, and the transcript from the hearing held on or about July 3, 2007. Based on this review, as well as a review of the relevant law, the Commissioner issues the following:

**PROCEDURAL HISTORY AND COMPOSITION OF RECORD**

1. Between October 27, 2006 and November 14, 2006, BCBS submitted 97 forms to the DOI for approval pursuant to Mont. Code Ann. § 33-1-501(1) (a).

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<sup>1</sup> For facilitation of language, the hearing examiner's "Proposed Order" as used herein means the hearing examiner's proposed findings of fact, conclusions of law and order.

2. On or about May 11, 2007, the DOI notified BCBS of its decision to disapprove the exclusion language in all 97 forms.

3. On or about May 21, 2007, BCBS requested a hearing concerning the DOI's disapproval of the 2006 Forms, and a contested hearing was held on July 3, 2007. The hearing was conducted pursuant to the hearings and appeals provisions of Mont. Code Ann. §§ 33-1-701 *et seq.*, the contested case provisions of Mont. Code Ann. §§ 2-3-101 *et seq.*, and the public participation in governmental operations notice and hearing provisions of Mont. Code Ann. §§ 2-3-101 *et seq.*

4. At the hearing held on July 3, 2007, the parties stipulated to 33 specific written facts and 25 specific and identifiable exhibits. At the hearing the DOI provided sworn testimony from two witnesses, Rosann Grandy, Forms Division Bureau Chief and Carol Roy, then Acting Deputy Insurance Commissioner. Both parties introduced additional exhibits during the hearing.

5. Following the hearing, both parties submitted proposed Findings of Fact and Conclusions of Law, and on October 31, 2007, the Hearing Examiner served his Proposed Findings of Fact, Conclusions of Law, and Order upon the parties.

6. Within the time frame prescribed and the opportunity provided by Mont. Code Ann. § 2-4-621, both parties submitted Exceptions to the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law, and Order. Neither party requested oral arguments although opportunity was provided for them to provide oral argument. The DOI submitted a brief in opposition and response to BCBS's exceptions. BCBS did not file any objection or response to the DOI's exceptions, nor did it file a reply to the DOI's response.

### **FINDINGS OF FACT**

1. Prior to and at the hearing of this matter the parties stipulated to 33 specific facts. Each of those facts was specifically incorporated into the hearing examiner's Proposed Order and will not be disturbed. Neither party objected to the stipulated facts during the hearing of the matter. Neither party objected to the specific findings in the Proposed Order that referenced or relied upon the stipulated facts. Thus, the Commissioner adopts the hearing examiner's Proposed Findings 1-32 as final Findings of Fact.

2. At the July 3, 2007 hearing, the following documents were offered and received into evidence by stipulation of the parties:

- Exhibit 1 Exclusions and Limitations (the 2001 Exclusion Amendments)
- Exhibit 2 BCBS Component Inventory Report dated October 16, 2001
- Exhibit 3 Letter from BCBS Ranalli to DOI Ford dated October 16, 2001 incl. 8 attachments
- Exhibit 4 Letter from BCBS Belcher to DOI Caruso dated November 13, 2001
- Exhibit 5 Order Appointing Hearing Examiner Cause No. 2001-71, dated December 5, 2001
- Exhibit 6 Letter from DOI Phillips to BCBS Belcher dated December 6, 2001
- Exhibit 7 Response to Demand for Hearing Cause No. 2001-71 dated December 7, 2001
- Exhibit 8 Stipulated Request to Postpone Hearing dated December 14, 2001
- Exhibit 9 DOI's Motion to Postpone Cause No. 2001-71 dated January 21, 2002
- Exhibit 10 Second Amended Notice of Hearing Cause No. 2001-71, dated February 1, 2002
- Exhibit 11 Letter from BCBS Shults to DOI Phillips dated March 5, 2002
- Exhibit 12 DOI's Motion to Postpone Cause No. 2001-71 dated March 6, 2002
- Exhibit 13 Order Vacating Hearing Cause No. 2001-71 dated March 12, 2002
- Exhibit 14 Letter from DOI Phillips to BCBS Belcher dated March 12, 2002

- Exhibit 15     Letter from BCBS Shults to DOI Phillips dated April 4, 2002
- Exhibit 16     DOI's Waiver Cause No. 2001-71 dated April 25, 2002
- Exhibit 17     Letter from BCBS Shults to DOI Caruso dated June 13, 2002
- Exhibit 18     Amended Notice of Hearing Cause No 2001-71 dated December 20, 2002
- Exhibit 19     a. Letters from BCBS Ranalli to DOI Grandy dated October 27, 2006  
                    b. Letters from BCBS Ranalli to DOI Grandy dated October 31, 2006  
                    c. Letter from BCBS Ranalli to DOI Grandy dated November 14, 2006  
                    d. Emails between BCBS Ask and DOI Goe dated between December 27, 2006 and April 19, 2007
- Exhibit 20     Letters from BCBS Ranalli to DOI marked 'Disapproved' dated May 11, 2007
- Exhibit 21     Letters from DOI Grandy to BCBS Ranalli dated Dec 14, 2006 and December 18, 2006
- Exhibit 22     Letter from BCBS Slanger to DOI Higgins dated May 1, 2007
- Exhibit 23     Letter from DOI Roy to BCBS Slanger incl. attachments dated May 7, 2007
- Exhibit 24     Letter from DOI Roy to BCBS Slanger incl. attachments dated May 11, 2007
- Exhibit 25     BCBS Request for Hearing Cause No. 2007-11 dated May 21, 2007

Each of these Exhibits was specifically incorporated into the hearing examiner's Proposed Order and will not be disturbed as they are part of the record pursuant to § 2-4-614, MCA. Neither party objected to the introduction of these exhibits at the hearing or in the objections and exceptions filed after the hearing. Thus, the Commissioner adopts as final the Proposed Findings to the extent they recognize, incorporate or cite to Exhibits 1-25.

3.       Also at the July 3, 2007 hearing, upon offer by the DOI, the following was received into evidence:

Exhibit 26     2006 Allegiance Life & Health Insurance Group Health Standard Policy (hereinafter referred to as the “Allegiance Policy”)

Exhibit 27     Consent Agreement and Final Order Cause No. 2006-31 dated May 27, 2007

Exhibit 28     Consent Agreement and Final Order Cause No. 2002-40 dated September 12, 2002

Also at the July 3, 2007 hearing, upon offer by BCBS, the following was received into evidence:

Exhibit B     Letter from BCBS Shults to DOI Grandy (incl. attachment concerning DOI’s approval of EOC 2005) dated August 25, 2006

Exhibit C     Letter BCBS Shults to DOI Grandy (incl. attachment concerning DOI’s approval of MC 2005) dated August 25, 2006

Exhibit D     2007 BCBS Blue Value Plan / Individual Medical Plan / \$500 Primary Care Benefit

Exhibit E     2007 BCBS Advantage Plan / Group Contract / Advantage Plan Sample

BCBS objected to the introduction of Exhibits 27 and 28 as to their relevance to the matters being heard. However, BCBS also admitted these are public records. The hearing examiner overruled BCBS’s objections regarding Exhibits 27 and 28. The Commissioner finds these exhibits are relevant to the questions BCBS raised regarding *res judicata* and similar theories. The DOI did not object to the admission of Exhibits D and E or object to the inclusion of Exhibits B and C in the Proposed Order. Thus, the Commissioner adopts as final the Proposed Findings to the extent they recognize Exhibits 26-28 and B-E.

4.     The DOI provided additional facts through testimony and exhibits during the hearing of this matter. Certain of these facts were specifically incorporated into the hearing examiner’s Proposed Order and will not be disturbed here, with the exception of correcting the facts found in the hearing examiner’s proposed finding numbered (36). Proposed finding numbered (36) contains a factual error by crediting witness Rosann Grandy with statements

made by witness Carol Roy and citing to the wrong place in the record. Because findings of fact must be based on competent, substantial evidence, erroneous citations to the record must be corrected. (See § 2-4-621, MCA and *Ulrich v. Board of Funeral Service* (1998), 289 Mont. 407, 412, 961 P.2d 126, 129.) Therefore, Proposed Finding numbered (36) is changed to accurately reflect the testimony provided by Ms. Grandy and will read as follows:

36. Subsequent to submission of the New West Health Insurance Services policy (Ex. B), but prior to disapproval of the BCBS policy, a policy was submitted to DOI for approval by Allegiance Life & Health Insurance Company (Allegiance) and approved. (Tr. at 40; Ex. 26.) Grandy testified the language regarding subrogation in the Allegiance policy was acceptable to DOI for compliance with Montana law. (Tr. at 40.) The Allegiance policy originally contained wording quite like the disapproved BCBS provisions, and DOI required its removal. (Tr. at 42.)

5. Neither party objected to the Proposed Order's specific findings regarding the testimony introduced by the DOI at the hearing. Thus, the Commissioner adopts Proposed Findings 33-42 as final Findings of Fact.

Based on the foregoing Final Agency Findings of Fact, the Commissioner makes the following:

### **CONCLUSIONS OF LAW**

1. Proposed Conclusions of Law (1) through (10), (12), (13), (15), (16), (19), (22), and (25) are irrefutable and contain the statutory provisions governing this matter. Neither party objected to any of the specific Proposed Conclusions of Law identified here and, therefore, the Commissioner adopts these specific Proposed Conclusions of Law as Final Conclusions of Law.

2. For the reasons set forth below, as well as those set forth by the hearing examiner in his Proposed Order, the Commissioner adopts Proposed Conclusion of Law (17) as a Final Conclusion of Law and overrules and denies BCBS's exception to the Proposed Conclusion.

3. BCBS objects to a series of Proposed Conclusions of Law (11), (14), (18), (20), (21), (23) and (24). For reasons set forth below, as well as the reasoning propounded by the hearing examiner, the Commissioner adopts Proposed Conclusions of Law (11), (14), (18), (20), (21), (23) and (24) as Final Conclusions of Law and overrules and denies BCBS's exceptions to these conclusions.

#### **MEMORANDUM ADDRESSING RESPONDENT'S EXCEPTIONS**

1. BCBS first supports its objection to the Proposed Conclusions of Law (11), (14), (18), (20), (21), (23) and (24) by arguing that Case Number 2001-71 was settled by mutual agreement in letters between legal counsels for the parties, and such agreement is eternally binding on the parties. BCBS argues the hearing examiner abused his discretion by ignoring the settlement agreement.

To begin with, the settlement agreement is irrelevant due to the statutory provisions of § 33-1-501(4), MCA, allowing the Commissioner to withdraw approval of forms at any time. The hearing examiner correctly reaches this conclusion. He does not dispute the parties reached some agreement in Case Number 2001-71. Rather, the hearing examiner disagrees with BCBS's understanding of the legal consequences of the agreement, concluding the agreement is not a permanently or indefinitely binding precedent.

Additionally, § 2-4-603, MCA, requires written disposition for informal, as well as formal, contested cases. While BCBS appears to place the settlement between itself and the DOI in the informal venue, the facts are that a hearing examiner was appointed to hear the matter and a scheduling order was duly issued. Neither BCBS nor the DOI fully acknowledged the formal nature of the contested case number 2001-71.

BCBS now complains that the completely informal resolution found in the letters between the parties is not a contravention of the most rudimentary understanding of “disposition” as set forth in the Montana Administrative Procedures Act (MAPA.) However, the letters do not follow the DOI’s standard procedures with regard to a final disposition of any case involving a hearing examiner, nor should precedent be set that allows letters between legal counsels to act as a formal, written disposition of any contested case filed and prosecuted pursuant to MAPA.

Therefore, for the reasons outlined above, in addition to those set forth in the Proposed Conclusions of Law, the Commissioner overrules and denies BCBS’s exception set forth in its filing as numbered paragraphs (4) and (6).

2. BCBS asserts the hearing examiner abused his discretion in his Proposed Conclusions of Law numbered (11), (14), (18), (20), (21), (23) and (24), by ignoring case law holding that an attorney can bind his client; thus the DOI is bound by the actions of its attorney, Kevin Phillips, in his settlement with BCBS.

Again, the settlement agreement is irrelevant due to the statutory provisions of § 33-1-501(4), MCA, allowing the Commissioner to withdraw approval of forms at any time. The hearing examiner correctly reaches this conclusion. BCBS further misconstrues the relevant and applicable law with regard to the Commissioner’s withdrawal of approval for insurance forms filed pursuant to Title 33, Chapter 1, Part 5 of the Montana Code. Section 33-1-501 (4) could not be any clearer where it sets forth the following language: “[t]he Commissioner may *at any time . . . withdraw any approval.*” (Emphasis added.) Attorney Phillips can only bind his client, the Montana Insurance DOI, to the extent allowed by law. Thus, his binding of the DOI does not extend to the Commissioner’s definitive statutory right to withdraw approval of forms filed

pursuant to Part 5 of Chapter 1 of the Montana Insurance Code. Additionally, the plain language of the statute assumes when approval may be withdrawn said approval was initially granted. The hearing examiner was correct in his application of the law with regard to whether and when the Commissioner is bound by the DOI's attorneys.

Furthermore, neither party alleged or substantiated that the agreement was contemplated to be of indefinite duration. Sections 33-1-502(1) and (2), MCA provide that the commissioner may withdraw previous approval of an insurance form if the form is in any respect in violation of or does not comply with this code, or contains or incorporates by reference any inconsistent, ambiguous, or misleading clauses or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract. A statute providing for authority to subsequently withdraw a previous approval is

“a declaration by the Legislature that the Commissioner can and should reexamine companies which do business within the [jurisdiction]. The Legislature clearly intended the Commissioner to have the power to disapprove, with cause, a form which had been approved previously. It is unlikely that the Legislature would tie the hands of the Commissioner so as to prohibit his later disapproval of forms when circumstances change, or where in his judgment approval of the original was improvidently given.” ***Physician Mutual Ins. Co. v. Denenberg***, 327 A.2d 415, 417, 15 Pa. Commw. 5909 (1974).

The Hearing Examiner determined that the evidence presented justified disapproval and/or withdrawal of the subject exclusions under § 33-1-501(2), MCA. Such conclusion survives BCBS's equitable attacks for the reason stated *infra*.

Finally, if there was a binding agreement concerning the subject exclusions in 2002, such agreement was subsequently terminated when BCBS sought approval of the new forms. A contract may manifest conditional obligations when the rights or duties of any party thereto depend upon the occurrence of an uncertain event. Section 28-1-401, MCA. A condition subsequent is one referring to a future event upon the happening of which the obligation

becomes no longer binding upon the other party if he so chooses to avail himself of the condition.

Here, the agreement tolerating the use of the subject exclusions in 2002, if any, included the implied condition subsequent that BCBS continues to use them in the future. Between October 27 and November 14, 2006, BCBS submitted a total of 97 insurance forms to the DOI for approval pursuant to § 33-1-501(1) (a), MCA. It thereby manifested its intention not to use the forms any longer that were the subject matter of Cause No. 2001-71. BCBS thereby availed itself of the opportunity to seek approval of new forms. In fact, it even threatened the DOI that BCBS would commence use of the new forms despite the missing approval. See Stipulated Exhibit 22. The implied condition subsequent occurred, and the DOI is no longer bound by its agreement, if any existed.

Therefore, for the reasons outlined above, as well as those set forth in the Proposed Conclusions of Law, the Commissioner overrules and denies BCBS's exception set forth as numbered paragraph (5).

3. BCBS objects to Proposed Conclusion of Law (17) based on the following rationale: Sections 33-1-501 (4) and 33-1-314 (2), MCA appear to be inconsistent and, therefore, § 33-1-314 (2), MCA is preempted by § 33-1-501 (4), MCA, per the statutory construction mandates of § 1-2-102, MCA. BCBS's argument then extends to an implication that the DOI or the Commissioner could not rely on § 33-18-206, MCA as a basis for disapproval of its forms or for withdrawal of prior approval of the same forms.

The Commissioner finds §§ 33-1-501(4) and 33-1-314(2), MCA are not inconsistent. Rather, § 33-1-314, MCA is cited in the text of § 33-1-501(4), MCA as the statute the Commissioner must rely upon for proper notice of the disapproval or withdrawal of approval for

any forms filed pursuant to Title 33, Chapter 1, Part 5, of the Montana Code. BCBS appears to misapprehend the intention of these statutes as well as § 33-1-502, MCA. Both § 33-1-501 (4) and § 33-1-314 (2) indicate any order or notice issued by the Commissioner must be written.

While § 33-1-501(4) clearly indicates the Commissioner's written notice of disapproval or withdrawal of approval must contain sufficient detail to apprise the filer of the reasons and legal support for those reasons for the lack of approval, the statute does not limit the legal sources for disapproval. Further this statute does not limit additional reasons being provided after the issuance of the initial notice of disapproval.

BCBS contends that § 33-1-502, MCA provides the sole reasons for disapproval or withdrawal of approval of forms filed pursuant to this part of the Insurance Code. BCBS is correct, yet fails to acknowledge the breadth of § 33-1-502 (1), MCA, which states approval for a form may be withdrawn or a form may be disapproved "if the form: (1) is in any respect in violation of or does not comply with this code." There is no dispute that § 33-18-206, MCA is a part of this code, and, therefore, available for application to forms as a test for the forms' legality.

Therefore, for the reasons outlined above, as well as those set forth in the Proposed Conclusions of Law, the Commissioner overrules and denies BCBS's exception set forth as numbered paragraph (3).

4. BCBS asserts its exception to the hearing examiner's failure to address what is perceived to be controlling authority regarding the application of § 33-18-206, MCA, to BCBS's filed forms. BCBS misinterprets the case it relies upon, *Universe Life Insurance Co. v. Mark O'Keefe, State Auditor for the State of Montana*, Cause No. ADV-93-557. This case is not persuasive as it is a partial summary judgment case from the First Judicial District Court in

Montana and the issue decided was whether the DOI had jurisdiction to regulate “rate discrimination based on gender and ‘wellness level’.” Judge McCarter accepts ARM 6.6.1201 as the sole source for identifying discrimination pursuant to and in violation of § 33-18-206, MCA. This administrative rule includes the language that discrimination may be found where insurers are “**limiting** the amount, **extent** or kind of coverage available to an individual.” (Emphasis added.) BCBS’s reliance on this case is misplaced and it misunderstands the meaning of the clause cited herein. The clearly stated basis of the DOI’s discrimination claim is that the language in the forms filed by BCBS discriminates by limiting the extent of the coverage available to the individual insureds.

Therefore, for the reasons outlined above, as well as those set forth in the Proposed Conclusions of Law, the Commissioner overrules and denies BCBS’s exception as set forth in the paragraph numbered (7).

5. BCBS submits the theory that the hearing examiner acted in contravention of Montana’s public policy with regard to motor vehicle insurance when he affirmed the withdrawal of approval and disapproval of BCBS’s proposed forms.

Withdrawing approval or disapproving BCBS’s forms has nothing to do with restricting or terminating or otherwise interfering with the public policy supporting the need for motor vehicle insurance. BCBS again misunderstands the reasons for the disapproval or withdrawal of approval of its proposed forms. BCBS’s disability insurance customers must first be made whole and then BCBS may seek subrogation of claims where motor vehicle insurance coverage is available for claims or reimbursement of payments after a third-party recovery. BCBS may not force customers to first rely on their motor vehicle insurance to cover disability claims that are rightfully claims against BCBS.

Furthermore, if the third party-insured chooses not to pay certain medical expenses although liability is reasonably clear, BCBS can refuse payment as well if it concludes that the third-party insured's liability is reasonably clear. This leaves the innocent injured insured exposed in a manner not allowed by law.

Therefore, for the reasons outlined above, as well as those set forth in the Proposed Conclusions of Law, the Commissioner overrules and denies BCBS's exception identified in numbered paragraph (8), (11) and (12).

6. BCBS takes exception to the hearing examiner's interpretation of law with regard to preclusion of double recovery by insurance claimants. The form changes proposed by BCBS are not necessary to prevent double recovery. Rather the proposed changes deny rights to coverage and are impermissibly misleading. BCBS's proposed changes inappropriately shift the burden from the insurer to the innocent insured with regard to recovery from either motor vehicle insurers or property insurers.

Therefore, for the reasons outlined above, as well as those set forth in the Proposed Conclusions of Law, Commissioner overrules and denies BCBS's exception identified in numbered paragraph (9).

7. BCBS attempts to argue the hearing examiner's failure to address its issue of the "arbitrary and capricious" actions of the DOI with regard to similar language submitted in forms by New West health service organization has unfairly prejudiced it. There are two problems with this argument: it is irrelevant and the facts do not support it.

Whether the DOI approved similar language in forms used by a different insurer is not relevant to whether BCBS's language violates the Montana Insurance Code. Clearly, BCBS's language violates § 33-1-502, MCA, and, by implication and extrapolation, it violates § 33-18-

206, MCA. More importantly, whenever the DOI deems an error has been made in approving forms or where there is a change in the law causing proposed form language to violate the Insurance Code, the Commissioner may withdraw prior approval.

Carol Roy, then Acting Deputy Insurance Commissioner, testified she was not part of the decision-making process with regard to New West's forms that BCBS complains about here. Tr. at 38: 25, 39, 1-3. Ms. Roy went on to testify she does not believe the New West language should have been approved. Tr. at 39: 4-6. She further testified that because she believes all insurers should be treated similarly by the DOI, she was taking action to correct the New West language to conform to the DOI's position. Tr. at 41: 22-25, 43: 1-5. BCBS's argument is not only irrelevant, it is moot.

Therefore, for the reasons outlined above, as well as those set forth in the Proposed Conclusions of Law, the Commissioner overrules and denies BCBS's exception identified in numbered paragraph (10).

8. BCBS alleges the hearing examiner erred by ignoring the legislature's intentions with regard to "excepted benefits." Much of this allegation is addressed in paragraph 4 of this part. Nonetheless, here BCBS overlooks the fact that while the legislature allows "excepted benefits," those exceptions cannot violate the Insurance Code. Further, "excepted benefits" represent a term of art not related to BCBS's proposed exclusions. Where, as here, the exclusions may mislead insurance consumers with regard to BCBS's assumption of risk for health issues, those exclusions represent unfair trade practices pursuant to § 33-18-206, MCA. The legislature cannot allow the law to be violated through the operation of a different provision of law. This is the absurd result BCBS seeks here.

Therefore, for the reasons outlined above, as well as those set forth in the Proposed Conclusions of Law, Commissioner overrules and denies BCBS's exception identified in numbered paragraph (11).

9. BCBS next argues the hearing examiner erred in Proposed Conclusion of Law 23 by misapplication of the law of waiver. Again BCBS misunderstands the law with respect to what is being waived by the language it proposes in its forms. BCBS argues the DOI waived its right to disallow the exclusions proposed.

BCBS's argument is flawed for two reasons. First, § 33-1-501(4), MCA expressly allows the Commissioner to withdraw his approval of *any form at any time*. This statutory provision cannot be waived as a matter of public policy. Pursuant to §1-3-204, MCA, "Any person may waive the advantage of a law intended solely for that person's benefit. A law established for a public reason cannot be contravened by a private agreement."

Importantly, however, neither the Commissioner nor the DOI can waive the rights of others. If the Commissioner allowed BCBS's proposed language he would effectively and inappropriately waive insurance consumers' statutory rights to avoid unfair trade practices and to avoid the insertion of deceitful language in their insurance policies. More importantly, were the Commissioner to allow BCBS's proposed form language, he would violate his statutory and constitutional duty to protect insurance consumers from nefarious assaults on the consumer's right to be treated fairly.

Therefore, for the reasons outlined above, as well as those set forth in the Proposed Conclusions of Law, Commissioner overrules and denies BCBS's exception identified in numbered paragraph (12).

10. BCBS complains the hearing examiner erred when he failed to address each of its proposed findings of fact pursuant to § 2-4-623 (4) MCA. Specifically, BCBS complains the hearing examiner did not address its proposed findings numbered 25-42, 46-48, 52, 54, 55, 56, 57, 61-63, and 65.

Montana case law clarifies § 2-4-623(4), MCA indicating it is not necessary for hearings examiners to provide an express disposition of each proposed finding. *State ex rel. Mont. Wilderness Ass'n v. Board of Natural Resources and Conservation of the State of Montana, et al.* (1982) 200 Mont. 11, 648 P.2d 734. Furthermore, a review of BCBS's lengthy submission reveals that BCBS did not rely upon its proposed findings of fact 25 through 42, 46 through 48, and 65 to derive any of its proposed conclusions of law. BCBS Proposed Findings of Fact, Recommended Conclusions of Law and Proposal for Decision, pp. 22-43. Nor did the Hearing Examiner rely upon these specific proposed findings submitted by BCBS. BCBS's proposed findings of fact 25-42, 46-48, and 65 serve no apparent purpose other than inflating the record.

The Hearing Examiner restated BCBS's proposed finding 52 in his proposed Finding of Fact No. 28, and analyzed it further in his proposed Conclusion of Law No. 17. Therefore, the hearing examiner did consider BCBS's proposed Finding of Fact.

Regarding BCBS's proposed Findings of Fact Nos. 54-57, particularly proposed Finding of Fact No. 57, the Hearing Examiner's ruling on these proposed findings are clear from his order: they were rejected. See *Montana Consumer Counsel v. Public Serv. Commis.* (1975), 168 Mont. 180, 193, 541 P.2d 770, 777. However, their substance was addressed and discussed by the Hearing Examiner in his Conclusions of Law 13c through 13k. See Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Order, pp. 27 through 29. Furthermore, it would be an unnecessary and idle act to remand for correction of any technical deficiency where

the record discloses an underlying factual basis for each finding. The law does not require idle acts. Section 1-3-223, MCA.

Therefore, for the reasons outlined above, as well as those set forth in the Proposed Conclusions of Law, Commissioner overrules and denies BCBS's exception identified in numbered paragraph (2).

11. Finally, BCBS makes a general objection that the hearing examiner's Proposal for Decision is in error, the conclusions are arbitrary and capricious, and the findings that address the testimony provided by the DOI are outside the stipulated facts making them clearly erroneous.

BCBS fails to support this general exception with any facts or law. A written demand to an agency must specify the grounds relied upon as a basis for the relief sought. Mont. Code Ann. § 33-1-701(2). BCBS's exception (1) with respect to the Hearing Examiner's proposed conclusions of law fails to present any particular argument or raise any particular issue.

Additionally, one party cannot control the record. According to § 2-4-614, MCA, the record includes more than simply stipulated facts. Due to its utter lack of support, the Commissioner interprets this exception as merely introductory to the other exceptions raised by BCBS.

Therefore, for the reasons outlined above, as well as those set forth in the Proposed Conclusions of Law, Commissioner overrules and denies BCBS's exception identified in paragraph (1).

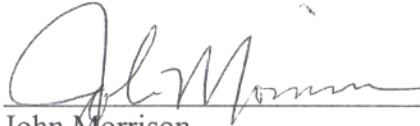
Based on the foregoing Final Findings of Fact and Final Conclusions of Law, the Commissioner hereby enters the following:

**ORDER**

The Commissioner adopts the hearing examiner's Proposed Order as the Final Order.

Thus, the forms filed by BCBS and identified in the Final Findings of Fact are disapproved and any prior approval, whether actual, perceived or otherwise contrived, is withdrawn.

SO ORDERED this 3 day of March, 2008.



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John Morrison  
Montana State Auditor  
Ex-officio Commissioner of Insurance

cc: Michael McMahon  
Jennifer Massman  
James Hunt

**BEFORE THE MONTANA STATE AUDITOR  
AND COMMISSIONER OF INSURANCE  
HELENA, MONTANA**

**IN THE MATTER OF:**

**Case No. INS-2007-11**

**BLUE CROSS AND BLUE SHIELD OF )  
MONTANA, INC., an authorized )  
Health Service Corporation, )  
Certificate of Authority )  
No. 2641, )  
Respondent. )  
\_\_\_\_\_ )**

**HEARING EXAMINER'S  
PROPOSED  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

Pursuant to mailed notice, on Tuesday, July 3, 2007, in the Second Floor Conference Room 608 of the State Auditor's Office, 840 Helena Avenue, Helena, Montana, a contested case hearing was conducted by the undersigned Hearing Examiner in the above matter. The hearing was conducted pursuant to the hearings and appeals provisions of the Montana Insurance Code (§§ 33-1-701, *et seq.*, MCA); the contested case provisions of the Montana Administrative Procedure Act (§§ 2-4-601, *et seq.*, MCA); and Montana's statutory, public participation in governmental operations notice and hearing provisions (§§ 2-3-101, *et seq.*, MCA).

At the contested case hearing, Jim Hunt, Legal Counsel for the Montana State Auditor's Office (MSAO) represented the Insurance Department (DOI) of the Commissioner of Insurance (COI). Michael F. McMahon, Esq. and Sean Slanger, Esq. represented the Respondent, Blue Cross and Blue Shield of Montana, Inc. (BCBS).

Testimony was presented on behalf of the DOI from Rosann Grandy, DOI Forms Bureau Chief; and Carol Roy, formerly the Bureau Chief of the Policyholder Services and presently the Acting Deputy Insurance Commissioner. No testimony was provided on behalf of BCBS.

Per stipulation of the attorneys for the parties (Tr. 8-9), the following 25 documents were offered and received into evidence: Old [October 5, 1989 and November 2, 1989\*] "Article Eleven - [liability insurance and auto] Exclusions and Limitations" (Stip. Exhibit 1); October 16, 2001, BCBS Component Inventory Report (Stip. Exhibit 2); October 16, 2001, Ford letter to Ranalli with eight other one-page documents, including October 22, 2001, Ford letter to Ranalli (Stip. Exhibit 3); November 13, 2001, Belcher letter to Caruso (Stip. Exhibit 4); December 5, 2001, "Order Appointing Hearing Examiner" in COI Case No. 2001-71 (Stip. Exhibit 5); December 6, 2001, Phillips to Belcher (Stip. Exhibit 6); December 7, 2001, DOI "Response to Demand for Hearing" in Case No. 2001-71

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\*Per Exhibit index.

(Stip. Exhibit 7); December 14, 2001, “Mutual Agreement to Postpone Hearing Date and Request for Later Hearing Date” in Case No. 2001-71 (Stip. Exhibit 8); DOI’s January 1, 2001 (sic), “Motion to Postpone” in Case No. 2001-71 (Stip. Exhibit 9); February 1, 2002, “Second Amended Notice of Hearing” in Case No. 2001-71 (Stip. Exhibit 10); March 5, 2002, Shultz letter to Phillips (Stip. Exhibit 11); DOI’s March 6, 2002, “Motion to Postpone” in Case No. 2001-71 (Stip. Exhibit 12); March 12, 2002, “Order Vacating Hearing” in Case No. 2001-71 (Stip. Exhibit 13); March 12, 2002, Phillips letter to Belcher (Stip. Exhibit 14); April 4, 2002, Shultz letter to Phillips (Stip. Exhibit 15); DOI’s April 25, 2002 “Waiver” in Case No. 2001-71 (Stip. Exhibit 16); June 13, 2002, Shultz letter to Caruso (Stip. Exhibit 17); December 20, 2002, “Amended Notice of Hearing” in Case No. 2001-71 (Stip. Exhibit 18); four October 27, 2006, letters, two October 31, 2006, letters, and one November 14, 2006, letter from Ranalli to COI’s Compliance Analyst, and three e-mails between Ask and Goe during the period December 27, 2006, to April 19, 2007 (Stip. Exhibit 19); the seven Stip. Exhibit 19 Ranalli letters marked “Disapproved” by DOI and dated May 11, 2007 (Stip. Exhibit 20); three December 14, 2006, letters and one December 18, 2006, letter from Grandy to Ranalli (Stip. Exhibit 21); May 1, 2007, Slanger letter to Higgins and the referenced enclosures (Stip. Exhibit 22); May 7, 2007, Roy letter to Slanger and the referenced enclosure (Stip. Exhibit 23); May 11, 2007, Roy letter to Slanger and

the referenced enclosures (Stip. Exhibit 24); May 21, 2007, Request for Hearing BCBS to COI and the referenced enclosures (Stip. Exhibit 25).

At the hearing, the following additional documents were offered and received into evidence on behalf of the Department: 2006 Allegiance Life & Health Insurance Company's Group Health Standard Insurance Policy (DOI Exhibit 26); May 29, 2007, "Consent Agreement and Final Order" in the *Matter of Prudent Choice, Stephen T. Cook*, Case No. INS 2006-31 (DOI Exhibit 27); September 12, 2002, "Consent Agreement and Final Order" in the *Matter of the Proposed Disciplinary Treatment of Ronald D. Dague*, Case No. 2002-40 (DOI Exhibit 28).

The following documents were offered and received into evidence on behalf of BCBS at the hearing: August 25, 2006, Shults letter to Grandy and referenced enclosures regarding Form Number EOC 2005 marked "Approved" by DOI on September 18, 2006 (BCBS Exhibit B); August 25, 2006, Shults letter to Grandy and referenced enclosures regarding Form Number MC 2005 marked "Approved" by DOI on September 6, 2006 (BCBS Exhibit C); 2007 Value Blue Plan, Individual Medical Plan, \$500 Primary Care Benefit (BCBS Exhibit D); January 1, 2007 Advantage Plan, Group Contract, Advantage Plan Sample (Small Group) (BCBS Exhibit E).

From the testimonial and documentary evidence presented, the Hearing Examiner makes the following proposed:

#### **FINDINGS OF FACT**

**1. BCBS is, and at all relevant times contained herein was, a licensed Health Service Corporation (HSC/Insurer) holding certificate of authority #2641 issued by the DOI (SF 1) and actively operates as such in Montana. (SF 2.)**

**2. Pursuant to § 33-1-501, MCA, BCBS filed the following two of three exclusion components with DOI's Life and Health Filing Division for review and approval on October 16, 2001.**

**Services, supplies, and medications provided to treat any injury to the extent the Member receives, or would be entitled to receive benefits, under an automobile insurance policy. ["auto exclusion"]**

**Services, supplies, and medications provided to treat any injury to the extent the Member receives, or would be entitled to receive benefits under a premises liability insurance policy or other liability insurance policy, including but not limited to, a homeowner's policy or business liability policy. ["liability insurance exclusion"]**

**(SF 3.)**

**3. BCBS asked to amend these two exclusions from their former terms and conditions as initially approved by DOI on October 5, 1989 (liability insurance exclusion) and November 2, 1989 (auto exclusion). The 1989 approved exclusions read as follows:**

**3. Benefits You receive, or would be entitled to receive, if not covered by this Contract under the medical expense provisions of an automobile insurance policy.**

**4. Benefits You receive, or would be entitled to receive, if not covered by this Contract, under the medical expense provisions of a premise liability insurance policy or other liability insurance policy, including but not limited to, a homeowner's policy or business liability policy.**

**(SF 4.)**

**4. DOI disapproved BCBS's filing to amend the auto exclusion and liability insurance exclusion on October 22, 2001, and again on November 2, 2001.**

**(SF 5.)**

**5. With regard to DOI's disapproval of the proposed auto exclusion and liability insurance exclusion, BCBS's attorney, Mary Belcher, submitted a "Demand for Hearing" for a contested case proceeding to DOI on November 13, 2001. (SF 6.)**

**6. BCBS's November 13, 2001, "Demand for Hearing" was filed pursuant to and in accordance with § 33-1-701, MCA, and the Montana Administrative Procedure Act (MAPA). (SF 7.)**

**7. DOI granted BCBS's "Demand for Hearing" and opened a contested case proceeding as Case No. 2001-71. (SF 8.)**

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**8. On December 5, 2001, DOI's Deputy Insurance Commissioner signed an Order appointing the undersigned as the Hearing Examiner for Case No. 2001-71. (SF 9.)**

**9. On December 6, 2001, DOI's attorney, Kevin Phillips, wrote to Belcher, indicating:**

**Please find our enclosed response and a mutual consent to postpone the hearing date. I have tweaked the consent so that the**

hearing officer knows to set the hearing for the later part of January. Please sign the mutual consent and ship it to me. I will ensure that the hearings officer gets the original copy.

I have also drafted a response to your demand for hearing. I have filed this document but realize that it might not be necessary if we are able to negotiate an agreement on the matter.

It was a pleasure meeting you the other day. In the meeting that we had in the commissioner's office, it seemed as if the matter was resolvable. I talked with your paralegal on the phone and she said that she was still working on the examples. When that happens, give me a call and we can arrange a quick meeting so that you can run through the examples.

(SF 10.)

10. In his December 6, 2001, Response to Demand for Hearing, DOI's Phillips alleged among other things, that:

4. The filed sections in question contain ambiguous or misleading clauses or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract, for which the State Auditor shall disapprove the filed sections pursuant to section 33-1-502, Mont. Code Ann.

5. The two sections in question, as used in the health maintenance organization policy, could be deemed as deceptive pursuant to section 33-31-312, Mont. Code Ann.

(SF 11.)

11. On December 14, 2001, Belcher and Phillips, signed a "Mutual Agreement to Postpone Hearing Date and Request for Later Hearing Date" in Case No. 2001-71, which provided among other things, that "[t]he parties will enter into serious negotiations, but request that the appointed hearing examiner

set a hearing for the last week of January, 2002 in the event the parties fail to reach agreement during negotiations.” (SF 12.)

12. On December 20, 2001, the undersigned issued an “Amended Notice of Hearing” (which was inadvertently and incorrectly dated 2002) ordering, among other things, that the hearing be held on February 1, 2002. (SF 13.)

13. On January 21, 2002, DOI’s Phillips filed an unopposed “Motion to Postpone” the February 1, 2002, hearing, indicating among other things, that “[t]he parties are entering into serious negotiation on January 22, 2002, and the expectation between both parties is that there is a good chance that the parties will reach a compromise before the reset hearing.” (SF 14.)

14. On February 1, 2002, the undersigned issued a “Second Amended Notice of Hearing” ordering, among other things, that the hearing would be held on March 18, 2002. (SF 15.)

15. On March 5, 2002, BCBS’s Shults, wrote to Phillips in regards to Case No. 2001-71, presenting to him BCBS’s redrafted exclusions for its member certificates and group contracts, indicating among other things that:

#### **Automobile Medical Payment Exclusion**

**Services, supplies, and medications provided to treat any injury to the extent the Member receives, or would be entitled to receive, benefits under an automobile insurance policy. Such benefits received by the Member shall be used first to satisfy any remaining Copayments and Deductibles related to the injury for which claims are submitted to The Plan. The injury related claims must be submitted to The Plan to apply any applicable credit to Copayments and/or Deductibles.**

### **Premises Medical Payment Exclusion**

**Services, supplies, and medications provided to treat any injury to the extent the Member receives, or would be entitled to receive, benefits from a premises liability policy. Examples of such policies are a homeowners or business liability policy. Such benefits received by the Member shall be used first to satisfy any remaining Copayments and Deductibles related to the injury for which claims are submitted to The Plan. The injury related claims must be submitted to The Plan to apply any applicable credit to Copayments and/or Deductibles.**

**After you have had an opportunity to review the redrafted language with Mr. Drynan, and if the language is acceptable, please advise Mary Belcher. BCBSMT will then formally present the language to Louise Ford for approval. Once the language submitted to the Department of Insurance for final approval, BCBSMT will agree to dismiss the pending hearing.**

**(SF 16.)**

**16. On March 6, 2002, DOI's Phillips, filed an unopposed "Motion to Postpone" the March 18, 2002, hearing, indicating among other things, that "[t]he State Auditor's Office is reviewing language that was given to them by Blue Cross Blue Shield of Montana and the expectation between the parties is that there is a good chance that the parties will reach a compromise before the reset hearing."**

**(SF 17.)**

**17. On March 12, 2002, the undersigned issued an order vacating the March 18, 2002, hearing, additionally indicating that "[u]pon the request of either party, a scheduling conference will be held to reschedule the hearing for a later date and time." (SF 18.)**

18. On March 12, 2002, DOI's Phillips wrote to BCBS's Belcher in regards to Case No. 2001-71, stating, among other things, that:

In talking with you the other day, we discussed that I was generally happy with the language that you had proposed in your March 5, 2002 letter. However, I did have concerns over the language "or would be entitled to receive, . . ." As I explained, I thought that this was wide open language and that Blue Cross could decline full payment based on supposed med pay coverage that would never materialize for the insured. You stated that maybe you could add the language "where liability is reasonably clear" to make the statement less ambiguous. I think that is an acceptable solution.

If there are concerns about the Flesch test pursuant to the "Life and Disability Insurance Policy Language Simplification Act", the Commissioner could authorize a lower score for those two matrixes pursuant to 33-15-327, MCA. Please understand that I am not offering a carte' blanche waiver on the whole contract, but just if the use of either of those two matrixes would cause the Flesch score to be unacceptable, then the waiver would apply. If the Flesch score would be unacceptable even without the addition of either of the two matrixes, then of course, adding them in would not cause the waiver to take effect.

We also had a concern about what the plan would cover. In talking with Sybil Shults, she very ably explained that the plan excludes coverage, but never really states what the plan covers. She e-mailed over the language. Because of her explanation and e-mail, we no longer have those concerns.

If you are amenable to this proposed settlement, please send over the two matrixes with the revised language, along with a request for a limited waiver (as I have outlined) for section 33-15-327, MCA, and hopefully this matter will be resolved.

(SF 19.)

19. On April 4, 2002, BCBS's Shults wrote to Mr. Phillips in regards to Case No. 2001-71, stating, among other things, that:

Pursuant to your letter to Mary Belcher dated March 12, 2002, I have attached the final redrafted automobile medical insurance and premises medical insurance exclusions for approval for use in the Blue Cross and Blue Shield of Montana ("BCBSMT") group contracts and member certificates. Accordingly, please note the following attachments for filing:

- \* Two components (exclusions), PMAAACJA and PMAPAHBB, Form M89, group contract;
- \* Two components (exclusions), MMAAACJA and MMAPAHBB, Form C93, members' certificate; and
- \* A letter from Martha Ranalli regarding the Flesch scores.

If the documents meet with your approval, please forward the same to Ms. Louise Ford for processing. Once approval is provided by Ms. Ford, BCBSMT will move to dismiss the hearing now scheduled in the above referenced matter.

(SF 20.)

20. The parties, through their respective duly authorized and acting attorneys, Belcher and Phillips, agreed upon the following language for the subject exclusions:

#### **Automobile Medical Payment Exclusion**

Services, supplies, and medications provided to treat any injury to the extent the Member receives, or would be entitled to receive where liability is reasonably clear, benefits under an automobile insurance policy. Such benefits received by the Member shall be used first to satisfy any remaining Copayments and Deductibles related to the injury for which claims are submitted to The Plan. The injury related claims must be submitted to The Plan to apply any applicable credit to Copayments and/or Deductibles.

#### **Premises Medical Payment Exclusion**

Services, supplies, and medications provided to treat any injury to the extent the Member receives, or would be entitled to receive

where liability is reasonably clear, benefits from a premises liability policy. Examples of such policies are a homeowners or business liability policy. Such benefits received by the Member shall be used first to satisfy any remaining Copayments and Deductibles related to the injury for which claims are submitted to The Plan. The injury related claims must be submitted to The Plan to apply any applicable credit to Copayments and/or Deductibles.

(SF 21.)

21. On April 25, 2002, DOI, through its Deputy Insurance Commissioner, issued a Waiver on the subject exclusions for a lower Flesch Score, but reserved “the right to reject these two above referenced components if the Commissioner finds that the Flesch Score does not meet the description of being ‘slightly below the requirement.’” (SF 22.)

22. On June 13, 2002, BCBS’s Shults, wrote to Phillips and Ms. Caruso (the Deputy Insurance Commissioner) in regards to Case No. 2001-71, saying, among other things:

I am writing as a follow up to the Department of Insurance’s waiver, dated April 25, 2002 and its final approval of the Automobile and Premises Medical exclusions (components: PMAAACJA and MMAPAHBB of Form M89 and MMAAACJA and MMAPAHBB of Form C93, members’ certificates), which occurred on May 15, 2002. Blue Cross and Blue Shield of Montana (“BCBSMT”) respectfully requests that case number 2001-71 be dismissed, as the parties have reached agreement on the language at issue.

(SF 23.)

23. Neither DOI nor BCBS notified the undersigned of the parties’ agreement in Case No. 2001-71, or of BCBS’s June 13, 2002, request to dismiss the contested case proceeding because of the parties’ agreement. (SF 24.)

24. On October 27, 2006, October 31, 2006, and November 14, 2006, BCBS filed ninety-seven (97) forms with DOI for review and approval. (SF 25.)

25. BCBS did not seek approval in any of its 97 form filings to amend or modify the 2002 agreed upon language of the automobile exclusion or liability insurance exclusion that resulted in the dismissal of Case No. 2001-71. (SF 26.)

26. On or about December 14, 2006, and December 18, 2006, DOI's Grandy sent letters to BCBS's Benefit Contract Consultant, Martha Ranalli explaining, among other things in both letters that "Exclusions and Limitations' ~ 3. & 4. [auto and liability insurance exclusions]. Please remove these two exclusions. These items should be dealt with within a Subrogation provision." (SF 27.)

27. On May 1, 2007, BCBS informed DOI, among other things, that (a) BCBS did not believe DOI could disallow the subject exclusions based upon the parties' agreement in Case No. 2001-71; (b) BCBS did not believe DOI had provided it with specific authority to disapprove the subject exclusions; and (c) BCBS would deem the remaining forms approved by DOI and begin using them on May 14, 2007. (SF 28.)

28. On May 7, 2007, DOI, among other things, provided to BCBS its explanation on why DOI felt the subject exclusions did not comply with Montana law. It also requested BCBS to advise it by 5:00 p.m. on May 10, 2007, whether BCBS still believed it could deem the forms approved and begin using them (on

May 14, 2007) or the Department would formally disapprove the forms on May 11, 2007. (SF 29.)

29. BCBS did not respond to DOI's May 7, 2007, letter. (SF 30.)

30. On May 11, 2007, DOI informed BCBS that DOI was disapproving the forms. (SF 31.)

31. BCBS's form reference numbers for the disapproved forms are:

SECLGMG2007	Member Guide Security Plan Sample (Large Group)
SECLGCONT2007	Group Contract Security Plan Sample (Large Group)
SECSGCONT2007	Group Contract Security Plan Sample (Small Group)
SECSGMG2007	Member Guide Security Plan Sample (Small Group)
ADVLGCONT2007	Group Contract Advantage Plan Sample (Large Group)
ADVLGMG2007	Member Guide Advantage Plan Sample (Large Group)
ADVSGCONT2007	Group Contract Advantage Plan Sample (Small Group)
ADVSGMG2007	Member Guide Advantage Plan Sample (Small Group)
HFLGCONT2007	Group Contract Health First Sample (Large Group)
HFLGMG2007	Member Guide Health First Sample (Large Group)
HFSGCONT2007	Group Contract Health First Sample (Small Group)
HFSGMG2007	Member Guide Health First Sample (Small Group)
BCLGCT2007	Group Contract Blue Choice Sample (Large Group)
BCLGMG2007	Member Guide Blue Choice Sample (Large Group)
BCSMCT2007	Group Contract Blue Choice Sample (Small Group)
BCSMMG2007	Member Guide Blue Choice Sample (Small Group)
BSELLGCT2007	Group Contract Blue Select Sample (Large Group)

<b>BSELLGMG2007</b>	<b>Member Guide Blue Select Sample (Large Group)</b>
<b>BSELSGCT2007</b>	<b>Group Contract Blue Select Sample (Small Group)</b>
<b>BSELSGMG2007</b>	<b>Member Guide Blue Select Sample (Small Group)</b>
<b>SECPPOLGCONT2007</b>	<b>Group Contract Security PPO Sample (Large Group)</b>
<b>SECPPOSGCONT2007</b>	<b>Group Contract Security PPO Sample (Small Group)</b>
<b>SECPPOLGMG2007</b>	<b>Member Guide Security PPO Sample (Large Group)</b>
<b>SECPPOSGMG2007</b>	<b>Member Guide Security PPO Sample (Small Group)</b>
<b>UNFRMLGCONT2007</b>	<b>Group Contract Uniform Plan Sample (Large Group)</b>
<b>UNFRMLGMG2007</b>	<b>Member Guide Uniform Plan Sample (Large Group)</b>
<b>UNFRMSGCONT2007</b>	<b>Group Contract Uniform Plan Sample (Small Group)</b>
<b>UNFRMSGMG2007</b>	<b>Member Guide Uniform Plan Sample (Small Group)</b>
<b>STDRDLGCONT2007</b>	<b>Group Contract Standard Plan Sample (Large Group)</b>
<b>STDRDLGMG2007</b>	<b>Member Guide Standard Plan Sample (Large Group)</b>
<b>STDRDSGCONT2007</b>	<b>Group Contract Standard Plan Sample (Small Group)</b>
<b>STDRDSGMG2007</b>	<b>Member Guide Standard Plan Sample (Small Group)</b>
<b>UNIFORMIND2007</b>	<b>Individual Plan \$1,000 Deductible 50% Coinsurance</b>
<b>BCPERSIND2007</b>	<b>Individual Medical Plan</b>
<b>DNTPRTHVISSGCONT2007</b>	<b>Group Contract Stand Alone Dental A Ortho/Vision Sample (Small Group)</b>
<b>DNTORTHVISSGMG2007</b>	<b>Member Guide Stand Alone Dental A Ortho/Vision Sample (Small Group)</b>
<b>DNTORTHVISLGMG2007</b>	<b>Member Guide Stand Alone Dental/Ortho/Vision Sample (Large Group)</b>
<b>DNTORTHVISLGCONT2007</b>	<b>Group Contract Stand Alone Dental A Ortho/Vision Sample (Large Group)</b>
<b>STBIND2007</b>	<b>Short Term Medical Plan \$1,000 Deductible 20% Coinsurance</b>

<b>PCPIND2007</b>	<b>Individual Plan \$500 Deductible 30% Coinsurance</b>
<b>HMPIND2007</b>	<b>Individual Plan \$500 Deductible 30% Coinsurance</b>
<b>VALBLUEIND2007</b>	<b>Individual Medical Plan \$500 Primary Care Benefit</b>
<b>MTYCIND2007</b>	<b>Individual Medical Plan \$400 Primary Care Benefit</b>
<b>HDHPMTIND2007</b>	<b>Individual Plan \$5,000 Deductible No Coinsurance</b>
<b>HIGHDEDIND2007</b>	<b>Individual Medical Plan \$2,250 Deductible No Coinsurance</b>
<b>HFPOLGCONT2007</b>	<b>Group Contract Health First PPO Sample (Large Group)</b>
<b>HFPOLGMG2007</b>	<b>Member Guide Health First PPO Sample (Large Group)</b>
<b>HFPPOSGCONT2007</b>	<b>Group Contract Health First PPO Sample (Small Group)</b>
<b>HFPPOSGMG2007</b>	<b>Member Guide Health First PPO Sample (Small Group)</b>
<b>ADVPPOLGCONT2007</b>	<b>Group Contract Advantage PPO Sample (Large Group)</b>
<b>ADVPPOLGMG2007</b>	<b>Member Guide Advantage PPO Sample (Large Group)</b>
<b>ADVPPPOSGCONT2007</b>	<b>Group Contract Advantage PPO Sample (Small Group)</b>
<b>ADVPPPOSGMG2007</b>	<b>Member Guide Advantage PPO Sample (Small Group)</b>
<b>CMMPPOLGCONT2007</b>	<b>Group Contract CMM PPO Sample (Large Group)</b>
<b>CMMPPOLGMG2007</b>	<b>Member Guide CMM PPO Sample (Large Group)</b>
<b>HDHPMTPPOLGCONT2007</b>	<b>Group Contract HDHP Montana Plan PPO Sample (Large Group)</b>
<b>HDHPMTPPOLGMG2007</b>	<b>Member Guide HDHP Montana Plan PPO Sample (Large Group)</b>
<b>HDHPMTPPPOSGCONT2007</b>	<b>Group Contract HDHP Montana Plan PPO Sample (Small Group)</b>
<b>HDHPMTPPPOSGMG2007</b>	<b>Member Guide HDHP Montana Plan PPO Sample (Small Group)</b>

<b>HFBASPPOLGCONT2007</b>	<b>Group Contract Health First Basic PPO Sample (Large Group)</b>
<b>HFBASPPOLGMG2007</b>	<b>Member Guide Health First Basic PPO Sample (Large Group)</b>
<b>HFBASPPOSGCONT2007</b>	<b>Group Contract Health First Basic PPO Sample (Small Group)</b>
<b>HFBASPPOSGMG2007</b>	<b>Member Guide Health First Basic PPO Sample (Small Group)</b>
<b>SPPPPOLGCONT2007</b>	<b>Group Contract Security Plus PPO Sample (Large Group)</b>
<b>SPPPPOLGMG2007</b>	<b>Member Guide Security Plus PPO Sample (Large Group)</b>
<b>SPPPPOSGCONT2007</b>	<b>Group Contract Security Plus PPO Sample (Small Group)</b>
<b>SPPPPOSGMG2007</b>	<b>Member Guide Security Plus PPO Sample (Small Group)</b>
<b>CMMLGCONT2007</b>	<b>Group Contract CMM Plan Sample (Large Group)</b>
<b>CMMLGMG2007</b>	<b>Member Guide CMM Plan Sample (Large Group)</b>
<b>HDHPMTLGCONT2007</b>	<b>Group Contract HDHP Montana Plan Sample (Large Group)</b>
<b>HDHPMTLGMG2007</b>	<b>Member Guide HDHP Montana Plan Sample (Large Group)</b>
<b>HDHPMTSGCONT2007</b>	<b>Group Contract HDHP Montana Plan Sample (Small Group)</b>
<b>HDHPMTSGMG2007</b>	<b>Member Guide HDHP Montana Plan Sample (Small Group)</b>
<b>SPPLGCONT2007</b>	<b>Group Contract Security Plus Plan Sample (Large Group)</b>
<b>SPPLGMG2007</b>	<b>Member Guide Security Plus Plan Sample (Large Group)</b>

<b>SPPSGCONT2007</b>	<b>Group Contract Security Plus Plan Sample (Small Group)</b>
<b>SPPSGMG2007</b>	<b>Member Guide Security Plus Plan Sample (Small Group)</b>
<b>BSAVLGCONT2007</b>	<b>Group Contract Blue Saver Plan Sample (Large Group)</b>
<b>BSAVLGMG2007</b>	<b>Member Guide Blue Saver Plan Sample (Large Group)</b>
<b>BSAVSGMG2007</b>	<b>Member Guide Blue Saver Plan Sample (Small Group)</b>
<b>BSAVSGCONT2007</b>	<b>Group Contract Blue Saver Plan Sample (Small Group)</b>
<b>ESSCAREIND2007</b>	<b>The Essential Care Plan Individual Medical Plan</b>

(SF 32.)

32. On May 21, 2007, BCBS requested an administrative hearing regarding DOI's disapproval of the subject exclusions, which were substantially similar to those previously agreed to by the parties and that resulted in BCBS's dismissal of Case No. 2001-71. The language of the subject exclusions that DOI disapproved in BCBS's 2006 filed forms was as follows:

#### **EXCLUSIONS AND LIMITATIONS**

**All Benefits provided under this Contract are subject to the Exclusions and Limitations in this section and as stated under the Benefit Section. Except as otherwise provided in this Contract, The Plan will not pay for:**

3. **Services, supplies, and medications provided to treat any injury to the extent the Member receives, or would be entitled to receive where liability is reasonably clear, benefits under an automobile insurance policy. Such benefits received by the Member shall be used first to satisfy any remaining Coinsurance, Copayments and Deductibles related to the injury for which claims are submitted to The Plan. The injury**

related claims must be submitted to The Plan to apply any applicable credit to Coinsurance, Copayments and/or Deductibles.

4. Services, supplies, and medications provided to treat any injury to the extent the Member receives, or would be entitled to receive where liability is reasonably clear, benefits from a premises liability policy. Examples of such policies are a homeowners or business liability policy. Such benefits received by the Member shall be used first to satisfy any remaining Coinsurance, Copayments and Deductibles related to the injury for which claims are submitted to The Plan. The injury related claims must be submitted to The Plan to apply any applicable credit to Coinsurance, Copayments and/or Deductibles.

(SF 33 and Exh. E, p. 46.)

33. DOI's Forms Division Bureau Chief, Rosann Grandy (Grandy) testified to having been employed by DOI for the past twenty-two years, the last three of which have been in her present position. (Tr. 7-8.) As part of her job, Grandy reviews policy language for approval or disapproval, sometimes with and sometimes without her consultation with DOI's legal division, and thereafter notifies the submitting insurance company of her determination. (Tr. 19-22.)

34. Grandy received ninety (97) forms from BCBS's Martha Ranalli (Ranalli) in October and November of 2006. (Tr. 13-14; Exh. 19.) Grandy subsequently informed BCBS on December 14, 2006, that certain forms were not acceptable, eventually stamping them "DISAPPROVED" and notifying BCBS. (Tr. 21-22; Exhs. 20 and 21.)

35. During the interim between submission and eventual disapproval, e-mail correspondence occurred between DOI and Ranalli, at which time Grandy was made aware of a matter in the 2001-2002 time frame regarding DOI's review of similar language from another insurance company. (Tr. 16, 18, 21, 29-30.) Grandy's problem with this earlier (2001-2002) language is that "[i]t does not allow for a claimant to be made whole as required in the subrogation provisions" (Tr. 20) and that these items should be contained within a subrogation provision. (Tr. 31-33, 39.)

36. Subsequent to submission of the New West Health Insurance Services policy (Exh. B), but prior to disapproval of the BCBS policy, a policy was submitted to DOI for approval by Allegiance Life & Health Insurance Company (Allegiance) and approved. (Tr. 40; Exh. 26.) Grandy testified the language regarding subrogation in the Allegiance policy was acceptable to DOI (Tr. 40), as was the language in the New West policies regarding the same (Exhibits B and C; Tr. 56-57) for compliance with Montana law. (Tr. 41.) The Allegiance policy originally contained wording quite like the disapproved BCBS provisions, and DOI required its removal. (Tr. 42.)

37. DOI's Carol Roy, Bureau Chief of the Policyholder Services, testified to having been employed by DOI since 1988, first in policyholder services and becoming Bureau Chief in November, 2003, and then as Acting Deputy Insurance Commissioner in December, 2006. (Tr. 45, 49.)

**38. As Bureau Chief, Roy supervised the handling of insurance inquiries and complaints from policyholders and the general public. (Tr. 46.)**

**39. Roy became aware of the language in the exclusions and limits portion of BCBS's submitted policy in September, 2006. (Tr. 47.) Based on her examination and consultation with DOI legal staff, Roy thought the policy should contain some language about the consumer having the right to be made whole and that the exclusion section was not the best place to locate that provision because an auto-accident injured person would not tend to go to the exclusion section of the policy looking for subrogation. (Tr. 48.)**

**40. When the language was not changed by BCBS after correspondence between DOI and BCBS, Roy believed the policy language should ultimately be disapproved. (Tr. 49-50.)**

**41. BCBS's Sean Slanger informed Roy that BCBS would deem the policy forms approved and begin using them on May 14, 2007, (Tr. 51; Exh. 22) which precipitated Roy's May 7, 2007, response reminding BCBS of other nonapprovable factors in addition to the exclusion limitations and the recovered reimbursement provision that had not been changed as of May 7, 2007. (Tr. 16, 51-52; Exhs. 21 and 23.) Roy's letter also requested BCBS's response by May 10, 2007, and upon receiving no response, Roy issued disapproval of the forms on May 11, 2007. (Tr. 52; Exh. 23.)**

42. On cross-examination, Roy affirmed she gave two reasons in her May 11, 2007, letter (Exh. 24) for disapproval of BCBS's forms, stating paragraphs 3 and 4 of the Exclusions and Limitations provision "do not comply with Sections 33-30-1101 and 33-30-1102, Mont. Code Ann., and deceptively affect the risk purported to be assumed in the general coverage of the contract." (Tr. 66-67; Exh. 24.)

From the foregoing findings of fact, the Hearing Examiner makes the following proposed:

CONCLUSIONS OF LAW

1. The State Auditor is the Commissioner of Insurance (COI). Section 2-15-1903, MCA.

2. The Montana Department of Insurance (DOI) is under the control and supervision of the COI. Sections 2-15-1902 and 33-1-301, MCA.

3. The COI has jurisdiction over this matter pursuant to § 33-1-311, MCA.

4. The COI is require to enforce the applicable provisions of the laws of this state. Section 33-1-311, MCA. The COI has a duty to "ensure that the interests of consumers are protected" under § 33-1-311(3), MCA, and under § 33-1-311(2), MCA, has the

powers and authority expressly conferred upon the COI by, or reasonably implied from, the Laws of Montana.

5. The COI has the additional duty of reviewing and approving insurance policies and other insurance forms.

Section 33-1-501(1)(a), MCA.

6. After notice and for cause shown, the COI may at any time disapprove a form or withdraw a previous approval in whole or in part. Section 33-1-501(4), MCA.

7. Pursuant to § 33-1-314(1), MCA, orders and notices of the COI must be in writing, signed by the COI, or by his authority. For orders, the COI must state the grounds on which the order is based, as well as the statutory provisions pursuant to the action taken or proposed to be taken, but failure to designate a particular provision does not deprive the COI of the right to rely on a particular provision. Section 33-1-314(2)(b) and (c), MCA.

8. After the date of an insurer's receipt of the COI's notice of disapproval or withdrawal of approval, the insurer may not issue the form for delivery in Montana. Section 33-1-501(5), MCA.

9. For unresolved disputes regarding a disapproval or withdrawal of an approval, the insurer may request a hearing, as

provided for in § 33-1-701, MCA. Section 33-1-501(6), MCA. BCBS timely submitted its written request for a contested case hearing in accordance with § 33-1-701(1), MCA, arising from DOI's May 11, 2007, disapproval of the forms BCBS filed on October 27, October 31, and November 14, 2006, (the "Forms") under § 33-1-501, MCA.

10. Under § 33-1-502, MCA, the COI shall disapprove any form filed under § 33-1-501, MCA, or withdraw any previous approval thereof, only if the form: (1) does not comply with the Montana Insurance Code; (2) contains any inconsistent, ambiguous, or misleading clauses or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the insurance contract; (3) has any title, heading, or other indication of its provisions which is misleading; (4) is printed or otherwise reproduced in such manner as to render any provision of the form substantially illegible; (5) contains any provision that violates the provisions of § 49-2-309, MCA.

11. DOI's determination to disapprove the forms was correctly within the legal parameters of § 33-1-501, MCA.

12. BCBS is a Health Service Corporation. Section 33-30-102, MCA. All Health Service Corporations are subject to the

provisions of Title 33, Chapters 1, 18, 22 (except § 33-22-111), and 30 (amongst others) of the Montana Insurance Code, § 33-1-101, et seq., MCA. Section 33-30-102, MCA.

13. DOI contends provisions 3 and 4 of BCBS's policy (SF 33, *supra*) constitute *de facto* subrogation, and therefore violate §§ 33-22-1601 and 33-22-1602(4), MCA, as well as §§ 33-30-1101 and 33-30-1102(4), MCA. The undersigned agrees.

a. The interpretation of an insurance contract in Montana is a question of law. *Youngblood v. American States Ins. Co.*, 262 Mont. 391, 866 P.2d 203, 206 (1993); *Wellcome v. Home Ins. Co.*, 257 Mont. 354, 849 P.2d 190, 192 (1993).

b. Subrogation is an equitable doctrine which prevents injustice by compelling the ultimate payment of a debt by one who, in justice, equity, and good conscience, should pay it. *Skaug v. Mountain States Tel. & Tel. Co.*, 172 Mont. 521, 565 P.2d 628, 630 (1977) (citing *Bower v. Tebbs*, 132 Mont. 146, 314 P.2d 731 (1957)); *DeTienne Assoc. v. Farmers Union Mut. Ins.*, 266 Mont. 184, 879 P.2d 704, 707 (1994).

c. With some exceptions, subrogation against an insured is allowed if that insured has been made whole and has been fully compensated, which compensation includes costs and attorney's fees. *Youngblood*, 866 P.2d at 266 (citing *Skaug v.*

*Mountain States Tel. & Tel. Co.*, 172 Mont. 521, 565 P.2d 628, 632 (1977)).

d. An insurance company is only allowed to subrogate to the amount it actually paid. *Youngblood*, 866 P.2d at 206 (citing *Farmers Ins. Exchange v. Christenson*, 211 Mont. 250, 683 P.2d 1319, 1321 (1984)).

e. Subrogation is not intended to work as a limitation, exclusion, or reduction of coverage. See, *Youngblood*, 866 P.2d at 207-208.

f. A limitation of benefits or setoff against benefits as a result of a recovery by the insured from a third party has been found to be *de facto* subrogation. See, *Thayer v. Uninsured Employers' Fund*, 297 Mont. 197, 991 P.2d 447, 450 (1999).

g. A health service corporation may include a contract provision regarding its subrogation rights that "to the extent necessary for reimbursement of benefits paid to or on behalf of the insured, the health service corporation is entitled to subrogation, as provided for in § 33-3-1102, against a judgment or recovery received by the insured from a third party found liable for a wrongful act or omission that caused the

injury necessitating benefit payments." (Emphasis added) § 33-30-1101, MCA.

h. Section 33-30-1102(4), MCA, provides that "[t]he health service corporation's right of subrogation granted in § 33-30-1101 may not be enforced until the injured insured has been fully compensated for his injuries." (Emphasis added.)

i. Sections 33-30-1101 and 33-30-1102, MCA (as do §§ 33-22-1601 and 1602, MCA) require that an insured be made whole before the health service corporation can subrogate.

j. Article II, Section 16 of Montana's Constitution and Montana's firm public policy do not allow subrogation before damaged parties are made whole, i.e. full recovery. *Oberson v. Federated Mut. Ins. Co.*, 330 Mont. 1, 126 P.3d 459, 462 (2005).

k. Paragraphs 3 and 4 of the "Exclusions and Limitations" provision of the proposed BCBS policy forms limit and exclude health insurance benefits based on the real or perceived liability of a third-party. Unlike *Thayer* and the statutory scheme of the Uninsured Employers' Fund, the Montana Insurance Code requires that the insured be made whole ("fully compensated") before the insurer can subrogate, and therefore paragraphs 3 and 4 of BCBS's proposed policy violate §§ 33-22-1602(4) and 33-30-1102(4), MCA.

14. DOI also contends provisions 3 and 4 of BCBS's policy (SF 33, *supra*) are violative of § 33-1-502(2), MCA, by being inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract (insurance policy). The undersigned agrees.

a. The general coverage of BCBS's policy forms provide medical treatment benefits resulting from accidents. (Exhs. D and E.) As a specific example, proposed form ADVSGCONT2007, Advantage Plan Sample (Small Group), provides benefits for an "Accident Benefit" and further defines "Accident" as:

An unexpected traumatic incident or unusual strain which is:

- identified by time and place of occurrence;
- identifiable by part of the body affected; and
- caused by a specific event on a single day.

Some examples include:

- Fracture or dislocation.
- Sprain or strain.
- Abrasion, laceration.
- Contusion.

- Embedded foreign body.
- Burns.
- Concussion.

(Exhs. D and E.)

b. The coverage for an Accident (benefits payable) is subject to the "Exclusions and Limitations" section of the policy forms. (Exh. E at p. 46.)

c. Paragraphs 3 and 4 of the "Exclusions and Limitations" section in BCBS's policy forms make the insured's BCBS benefits for medical treatment resulting from an accident with a third-party tortfeasor, dependent on:

- (i) whether "liability is reasonably clear;"
- (ii) whether automobile (or premises insurance) exists; and
- (iii) the amount of such other insurance.

Additionally, if other insurance does not exist sufficient to cover all of the medical bills, these exclusions provide that BCBS would not have to pay any otherwise covered medical costs up to the limits of all such other insurance, even if the other insurance has paid for non-health care related damages such as lost wages or property damage. Such an application would result

in unpaid medical expenses that otherwise would be covered by BCBS's policy.

d. Because the existence and amount of liability insurance and uninsured/underinsured insurance available to an injured BCBS insured cannot be known until an accident occurs with a third-party tortfeasor, paragraphs 3 and 4 of the "Exclusions and Limitations" section in the policy forms create a shifting, variable deductible and illusory coverage which is inherently inconsistent, ambiguous, misleading, and deceptive. Accordingly, paragraphs 3 and 4 of the "Exclusions and Limitations" section of the proposed Blue Cross policy forms are inconsistent, ambiguous, misleading, and deceptively affect the risk purported to be assumed in the general coverage of the contract in violation of § 33-1-502(2), MCA.

15. In its May 21, 2007, hearing request BCBS raised the following affirmative defenses: (a) res judicata; (b) judicial estoppel; (c) collateral estoppel; (d) accord and satisfaction; (e) waiver; and (f) breach of contract, regarding DOI's May 11, 2007, reasons for disapproving its submitted forms.

16. In its June 20, 2007, "Notice of Proposed Agency Action and Hearing," DOI denied each of BCBS's affirmative defenses, and also asserted the following grounds not specified in its May 11,

2007, notice to BCBS in support of its disapproval of the subject exclusions:

- a. the exclusions violate § 33-18-206(2), MCA;
- b. the exclusions are inconsistent, ambiguous, and misleading;
- c. the exclusions violate Article II, § 4 of the Montana Constitution; and
- d. the exclusions violate Article II, § 16 of the Montana Constitution.

17. BCBS objected to DOI's additional grounds for the disapproval of the subject exclusions and moved at hearing to strike and preclude DOI from introducing any evidence or making any arguments, whether at the hearing, in its post hearing briefs, or proposed findings relative to DOI's assertions that the subject exclusions violate Article 2, Section 4 of the Montana Constitution; Article 2, section 16 of the Montana Constitution; § 33-18-501(4), MCA; and/or the exclusions are inconsistent, ambiguous, and misleading. (Tr. 6.) BCBS's objection is overruled in part because:

- a. Although § 33-1-501(4), MCA, provides in relevant part that a notice by the Commissioner must state the grounds for disapproval in sufficient detail to inform the insurer of the specific reason(s) for and the legal authority supporting the

disapproval. Section 33-1-314(2)(c), MCA, provides that "failure to designate a particular provision of the code does not deprive the" COI "of the right to rely on a particular provision."

Accordingly, the COI may find that the BCBS policy provisions at issue violate § 33-18-206, MCA, or any other provision of the Montana Insurance Code. Sections 33-1-101, *et seq.*, MCA.

b. As for § 33-1-502, MCA, providing the "only" reasons why the COI may disapprove any form filed under § 33-1-501, MCA, Roy's May 11, 2007, letter (Exh. 24) delineated two reasons for disapproval of the language contained in Exclusions and Limitations provision paragraphs 3 and 4 of the BCBS's forms: (1) the wording's noncompliance with §§ 33-30-1101 and 33-30-1102, MCA, and (2) the wording's deceptive affect on the risk purported to be assumed in the general coverage of the policy. (Tr. 66-67; Exh. 24.) As a basis for asserted disapproval, the former reason fits within the linguistic ambit of § 33-1-502(1) and/or (3), MCA, and the latter within the ambit § 33-1-502(2), MCA.

c. Because the DOI's two reasons contained in Roy's May 11, 2007, letter (Exh. 24) fall within the parameters of the language contained within § 33-1-502, MCA, there is no need to address BCBS's contention that the DOI did not, in any of its

correspondences or communications to BCBS, prior to or in its May 11, 2007, notice of disapproval indicate to BCBS, in any regard, that it believed the subject exclusions violated BCBS's six identified defenses contained in its May 21, 2007, hearing request.

18. BCBS contends DOI is precluded from disapproving the proposed exclusions and limitations policy language because substantially similar language was negotiated between BCBS and approved during the contested case of *In the Matter of Blue Cross Blue Shield of Montana*, Case No. 2001-71, and asserts that res judicata, judicial estoppel, and collateral estoppel prevent DOI from disapproving the policy language at issue in this matter. However, § 2-4-603(1), MCA, requires any informal disposition via stipulation, agreed settlement, consent order, or default that disposes of a case to be in writing. Although this previous matter was initiated as a contested case under the Montana Administrative Procedures Act (MAPA) §§ 2-4-101 *et seq.*, MCA, no hearing was held, no proposed or final findings of fact, conclusions of law, or order (consent or final) was ever entered. Nor was a signed, written stipulation or agreed settlement ever presented as evidence in the present matter. What was presented were documents containing language demonstrating potential

agreement or settlement (e.g. Exhs. 6, 9, 11, 12, 14, 17, 16, 18; Tr. 63-64), but nothing conclusive so as to evidence final disposal of the contested case upon which BCBS could substantively base any res judicata, judicial estoppel, and/or collateral estoppel claim(s).

19. Because the Montana Supreme Court has determined that Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers, the undersigned declines to address any of the Constitutional issues raised by the respective parties. *Jarussi v. Bd. of Tr. of Sch. Dist. No. 28*, 204 Mont. 131, 664 P.2d 316, 318 (1983).

20. Res judicata is a doctrine of common law origin, *Claim of Kowalski*, 260 Mont. 269, 860 P.2d 104, 108 (1993) and collateral estoppel is a form of res judicata. *Kullick v. Skyline Homeowners Ass'n., Inc.*, 316 Mont. 146, 69 P.3d 225, 229 (2003). The doctrine of res judicata states "that a final judgment on the merits by a court of competent jurisdiction is conclusive as to causes of action or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."

(Emphasis added.) *State v. Ditton*, 333 Mont. 483, 144 P.3d 783,

789 (2006); (Citing *Harlem Irr. Dist. v. Judicial Dist. Court*, 271 Mont. 129, 894 P.2d 943, 944-45 (1995)). Even assuming *arguendo* that there was in conclusive fact a settled, negotiated, or tacit approval in the earlier case, it is apparent that DOI/COI has statutory authority under §§ 33-1-501(4) and 33-1-502, MCA, to disapprove or withdraw any such earlier approval.

21. Judicial estoppel precludes a party from taking a position inconsistent with previously made declarations in a subsequent action or proceeding, which applies to unequivocal statements of fact and not legal theories or positions. *Watkins Trust v. Lacosta*, 321 Mont. 432, 92 P.3d 620, 627 (2004); *Kauffman-Harmon v. Kauffman*, 307 Mont. 45, 36 P.3d 408, 412 (2001). As between the previous and present BCBS matters, it does not appear DOI took inconsistent positions: DOI had language concerns in that matter as it does in the present one; otherwise there would not have been an issue resulting in a contested case.

One of the requisite elements is that the estopped party succeeded in maintaining its original position. *Id.* Again assuming *arguendo* that DOI (and just not its attorney) ultimately approved the language wrangled about in the previous matter, then DOI was not successful in its initial position, BCBS was.

22. Since BCBS presents no legal argument or proposed conclusion of law regarding its Accord and Satisfaction affirmative defense, it is deemed an abandoned defense.

23. As for BCBS's waiver affirmative defense, statutes creating rights for a public benefit are not subject to waiver. *Collection Bureau Services, Inc. v. Morrow*, 320 Mont. 478, 87 P.3d 1024, 1028 (2004) (citing *Rothwell v. Allstate Ins. Co.*, 293 Mont. 393, 976 P.2d 512 (1999) (employee indemnification statute not subject to waiver) and *State ex rel. Neiss v. Dist. Ct.*, 162 Mont. 324, 511 P.2d 979 (1973) (minimum wage is public benefit not subject to waiver)).



1        24. To the extent BCBS may be raising any issue of  
2 equitable estoppel, that doctrine is not applicable when the  
3 conduct complained of consists solely of an erroneous legal  
4 interpretation. *City of Whitefish v. Troy Town Pump, Inc.*, 304  
5 Mont. 346, 21 P.3d 1026, 1028-29 (2001).


6        25. The DOI has not asserted that any penalty or penalties  
7 be imposed upon BCBS.

8        From the foregoing Findings of Fact and Conclusions of Law,  
9 the Hearing Examiner proposes to the COS/COI the following:  
10

11                    ORDER

12        IT IS HEREBY ORDERED that DOI's May 11, 2007, disapproval  
13 and/or withdrawal of approval of paragraphs 3 and 4 in the  
14 "Exclusions and Limitations" section of BCBS's proposed forms  
15 pursuant to § 33-1-502, MCA, is affirmed.

16        Dated this 31<sup>st</sup> day of October, 2007.

17  
18                      
19                    Michael J. Rieley, Hearing Examiner

20  
21                    CERTIFICATE OF SERVICE

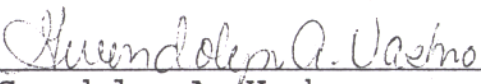
22        I do hereby certify I served a copy of the foregoing Hearing  
23 Examiner's Proposed Findings of Fact, Conclusions of Law, and  
24

1 Order upon all parties of record on the 31<sup>st</sup> day of October, 2007,  
2 by mailing, faxing, or hand delivering a copy thereof to:

3 Mr. Jim Hunt  
4 Hunt Law Firm  
5 310 Broadway  
6 Helena, MT 59601

7 Mr. Michael F. McMahon  
8 Hughes, Kellner, Sullivan & Alke, PLLP  
9 P.O. Box 1166  
10 Helena, MT 59624

11 Ms. Jennifer Massman  
12 State Auditor's Office  
13 840 Helena Avenue  
14 Helena, MT 59601

15   
16 Gwendolyn A. Vashro